

DATUK MUSA AMAN & ORS

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v.

TAN SRI CHONG KAH KIAT

COURT OF APPEAL, PUTRAJAYA

B

RAUS SHARIF JCA

ABDULL HAMID EMBONG JCA

SULONG MATJERAIE JCA

[CIVIL APPEAL NOS: S-01(IM)-87-2009 & S-01(IM)-101-09]

13 NOVEMBER 2009

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CIVIL PROCEDURE: *Action - Locus standi - Whether Foundation a private trust body - Essential pre-requisites of valid trust - Whether fulfilled - Whether respondent has legal standing to maintain action*

Two appeals S.01(IM)-87-09 and S-01-(IM)-87-2009 were simultaneously heard by this court on the same issue *ie*, to determine the question of whether the respondent who was suing as chairman of the Kudat Thean Hou Charitable Foundation had a legal standing to maintain this action. The respondent filed a writ action against the appellants seeking a declaration that an earlier approval given to the respondent was valid and thus could not be withdrawn. The approval was in respect of building a statue of a deity. It was not in dispute that the Kudat Thean Hou Charitable Foundation (the Foundation) which the respondent represented in his capacity as chairman in this action, was not a registered society or otherwise a legal body duly incorporated. The appellants took the stand that the respondent had no *locus standi* since the Foundation itself was an unlawful society. The respondent's stand now was that it was actually a private trust body and thus capable of maintaining this action.

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Held (allowing the appeals)

Abdull Hamid Embong JCA delivering the judgment of the court:

- (1) No property or rights had been settled for the purposes of the Foundation. A basic prerequisite of a valid trust was thus missing in this instance. In the absence of any subject vested onto the trustees the Foundation was merely a charity. The Foundation could not be said to be a validly constituted private trust when there had not been settled in the trustees any subject. Another feature which negated the supposition that the Foundation was a private trust, was the absence of any definite

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- A object *ie*, “a somebody in whose favour the court can decree performance.” Thus, the essential pre-requisites of a valid trust (*ie*, certainty of words, of subject, of object) were missing. (para 14)
- B (2) The respondent here was suing by his name as Chairman of the Kudat Thean Hou Charitable Foundation. The said Foundation was neither a registered society nor an incorporated private trust as alleged. The trustees too were never incorporated as required under Sabah Trustees (Incorporation) Ordinance (Cap. 148) Therefore, it had no *locus standi* to maintain its
- C action and to allow it to stand would be an abuse of the court’s process. (para 20)

Bahasa Malaysia Translation Of Headnotes

- D Dua rayuan S.01(IM)-87-09 dan S-01-(IM)-87-2009 didengar bersama-sama oleh mahkamah ini atas isu yang sama iaitu untuk memutuskan persoalan sama ada responden yang mengambil tindakan sebagai pengerusi Kudat Thean Hou Charitable Foundation mempunyai kedudukan di sisi undang-undang untuk
- E memulakan tindakan. Responden memfailkan tindakan writ terhadap perayu-perayu untuk menuntut satu deklarasi bahawa kelulusan yang telah diberi kepada responden adalah sah dan oleh itu tidak boleh ditarik balik. Kelulusan yang diberi adalah mengenai pembinaan patung sifat ketuhanan. Tidak dipertikaikan bahawa Kudat Thean
- F Hou Charitable Foundation (‘Foundation tersebut’) yang responden mewakili sebagai pengerusi di dalam tindakan ini, bukan pertubuhan berdaftar atau selainnya badan undang-undang yang telah diperbadankan. Perau-perayu mengambil pendirian bahawa responden tidak mempunyai *locus standi* kerana Foundation tersebut
- G adalah persatuan yang haram. Pendirian responden sekarang adalah Foundation tersebut sebenarnya badan amanah persendirian dan berkeupayaan memulakan tindakan ini.

Diputuskan (membenarkan rayuan-rayuan)

- H Oleh Abdull Hamid Embong HMR menyampaikan penghakiman mahkamah:
- I (1) Tidak terdapat hartanah atau hak-hak yang disediakan bagi tujuan Foundation tersebut. Pra-syarat asas amanah yang sah tidak terdapat di dalam keadaan ini. Dengan ketidakhadiran apa-apa subjek yang diletakhak ke atas pemegang-pemegang amanah Foundation tersebut hanyalah sebuah badan amal. Foundation tersebut tidak boleh dikatakan membentuk persendirian amanah

- apabila tidak terdapat penyediaan di dalam pemegang-pemegang amanah apa-apa subjek. Satu lagi ciri yang menidakkan anggapan bahawa Foundation adalah persendirian amanah, adalah ketidakhadiran objek yang dikenalpasti iaitu “seseorang untuk manfaat siapa mahkamah boleh memerintahkan pelaksanaan.” Oleh itu, pra-syarat penting amanah yang sah (contohnya kepastian perkataan-perkataan, kepastian subjek, kepastian objek) tidak wujud di sini. A
- (2) Responden di sini sedang menyaman dengan namanya sebagai Pengerusi Kudat Thean Hou Charitables Foundation. Foundation tersebut bukanlah persatuan berdaftar atau amanah persendirian yang diperbadankan seperti yang didakwa. Pemegang-pemegang amanah juga tidak diperbadankan seperti yang diperlukan di bawah Ordinan Pemegang Amanah (Perbadanan) (Cap 148) (Sabah). Oleh itu, ia tidak mempunyai *locus standi* untuk memulakan tindakan dan membenarkannya adalah penyalahgunaan proses mahkamah. B
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- Case(s) referred to:**
- Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461 SC (*refd*) D
- Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Intervenors)* [2007] 4 CLJ 725 FC (*refd*) E
- Morice v. Bishop Of Durham* [1803-13] All ER 451 (*refd*)
- Richard v. Naum* [1967] 1 QB 620 (*refd*) F
- Tan Ching Choong & Ors v. Ekabina Sdn Bhd & Ors* [2002] 3 CLJ 61 HC (*refd*)
- Yeong Ah Chee v. Lee Chong Hai & Anor & Other Appeals* [1994] 3 CLJ 20 SC (*refd*)
- Legislation referred to:** G
- Rules of the High Court 1980, O. 33 r. 2
- Societies Act 1966, s. 4
- Trustees (Incorporation) Ordinance (Cap 148) (Sabah), s. 2
- Trustees Act 1949, s. 39(2)
- For the appellants - Dato' Mohd Shafee Abdullah (Richard Barnes & Hassan Hj Murtaza with him); M/s Shelly Yap* H
- For the respondents - YM Raja Aziz Addruse (Hj Ansari Abdullah & Erveana Ansari with him); M/s Ansari & Co*
- [Appeal from High Court, Kota Kinabalu; Suit No: K-22-19-2009] I
- Reported by Suhainah Wahiduddin

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JUDGMENT

Abdull Hamid Embong JCA:

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[1] Two appeals S-01(IM)-87-09 and S-01-(IM)-87-2009 were simultaneously heard by us. Both turn on the same issue ie, to determine the question of whether the respondent who is suing as chairman of the Kudat Thean Hou Charitable Foundation has a legal standing to maintain this action. The respondent (plaintiff below) filed a writ action against the appellants (defendants below) seeking for a declaration that an earlier approval given to the respondent was valid and thus cannot be withdrawn. The approval was in respect of building a statue of a deity and was given by the fourth respondent, the Kudat Town Board.

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[2] When trial commenced, the appellants filed an application under O. 33 r. 2 RHC to determine a preliminary issue namely whether the respondent being an unregistered society and/or an unlawful body has the *locus standi* to maintain this action.

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[3] It was not in dispute that the Kudat Thean Hou Charitable Foundation (the Foundation) which the respondent represented in his capacity as Chairman in this action, is not a registered society or otherwise a legal body duly incorporated.

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[4] The appellants took the stand that the respondent has no *locus standi* since the Foundation itself is an unlawful society. The respondent's stand now is that it is actually a private trust body and thus capable of maintaining this action.

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[5] The High Court found that the question of whether the Foundation is a private trust or a purported society is both a question of law and fact which can only be determined at the end of the trial after mature consideration of the evidence adduced at the trial. The learned judicial commissioner found that O. 33 RHC is an "unsuitable" path since evidence to determine the *locus standi* of the respondent cannot be produced at this preliminary stage. The appellants' application was consequently dismissed without actually giving an answer to the preliminary question raised by the appellants.

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[6] In our view this sole issue of *locus standi* of the respondent to maintain the action does not involve the substantive merits of the case and need not be determined at the end of a full trial.

[7] If the appellants succeeds in showing this lack of legal capacity of the respondent then the matter ends there without the need of a full blown trial, thus meeting the purpose of O. 33 RHC.

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[8] Order 33 r. 2 RHC states:

The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

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[9] The respondent had in fact conceded that if this issue of *locus standi* is determined in favour of the appellants there would be no necessity of a trial. This issue is thus a threshold issue that needs determination as a prelude to the trial itself.

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[10] The question of one's *locus standi* to maintain an action has been held in *Alor Jangus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461 to be a question suitable for disposal under O. 33 r. 2 RHC. (see also *Tan Ching Choong & Ors v. Ekabina Sdn Bhd & Ors* [2002] 3 CLJ 61.)

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[11] The appellants argument that the respondent has no *locus standi* is two-pronged. First, it was contended that the Foundation is not a registered body. Second, that by virtue of the Societies Act 1966, the Foundation is deemed an unlawful society.

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[12] The respondent took the stand that the preliminary question posed would not finally dispose of the substantive matter. Secondly, it was contended by Raja Aziz Addruse, learned counsel for the respondent that since all the facts were not yet before the trial court, it was proper for this preliminary issue be reserved until all the evidence are unveiled. A passage from *Richard v. Naum* [1967] 1 QB 620 was read to us in support of this proposition. It says:

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If this issue were determined as a preliminary issue, the preliminary point might go to the House of Lords. They might say: 'You must get the facts before we decide the law.' Rather than put the parties to all that expense (and, I may add, delay), I think we should have the facts ascertained in the trial court before the difficult and important point of law is decided.

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A Learned counsel submitted that this appellate court should thus not interfere unless it found that the trial judge was plainly wrong in not deciding on this preliminary issue. He concluded that the learned judicial commissioner had not wrongly exercised her discretion.

B [13] It may again be noted that, and this is not disputed, the Foundation was never incorporated or registered. The Foundation's application to incorporate its trustees under the provisions of the Trustees (Incorporation) Ordinance (Cap 148) (Sabah) was disallowed (more of this later). If incorporated it would certainly have the capacity to sue. Section 2 of that Ordinance states that trustees to any body or association, once incorporated, becomes a body corporate and have the power to sue and be sued in its corporate name.

D [14] The respondent has since changed its stance when this application was argued in the court below. It now states that it was established as a private trust, with Tan Sri Chong Kah Kiat as its Chairman. But its pleadings show that this is not the position taken by the respondent when filing this action. The respondent had initially pleaded that it was a Foundation and/or a society. And surely it is trite that a party in any civil action is bound by its pleadings. That aside, it can be seen from the documentary evidence in the form of the trust deed (exh. CKK1) that there are seven trustees to the so called private trust. Yet those seven trustees were not named as the plaintiffs in the action. Only Tan Sri Chong Kah Kiat is named the plaintiff as Chairman of the Foundation. The other feature which nullifies the argument that the Foundation is a private trust is the question of certainty of its subject, a legal requirement for creating a valid private trust. It is not disputed that no property or rights had been settled for the purposes of the Foundation. A basic prerequisite of a valid trust is thus missing in this instance. A private trust invariably deals with property already in hand, not one in the future. Thus, this uncertainty. In other words, in the absence of any subject vested onto the trustees the Foundation is merely a charity. So how could the Foundation be said to be a validly constituted private trust when there had not been settled in the trustees any subject? In *Yeong Ah Chee v. Lee Chong Hai & Anor & Other Appeals* [1994] 3 CLJ 20 the Supreme Court had held that:

I An incompletely constituted trust is one in which the trust properly has not been finally and completely vested in the trustee.

Similarly, in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 4 CLJ 725 the Federal Court ruled that:

Further, due to the uncertainty of what projects and works should come under the purported trust there is therefore uncertainty in the subject matter of the trust.

[15] Dato' Mohd Shafee Abdullah of counsel for the appellants also submitted that the trustees had run foul of s. 39(2) of the Trustees Act 1949 by naming seven trustees in the trust deed. The law limits the number of trustees in a private trust to four. We agree that the legal limit here has been contravened.

[16] It was also argued by the appellant that the naming of seven trustees shows that the intention was to establish a society not a private trust. The respondent had replied that these seven persons "were merely exercising their fundamental liberty to form an association and propagate the Taoist religion guaranteed under the Federal Constitution". This seems to confirm the appellants' argument. As a society which is not registered, it cannot therefore have any *locus standi* to pursue this action. Section 4 of the Societies Act 1966 makes the Foundation an unlawful society since it was not registered.

[17] Another feature which negates the supposition that the Foundation is a private trust, is the absence of any definite object ie, "a somebody in whose favour the court can decree performance" (see *Morice v. Bishop Of Durham* [1803-13] All ER 451). Thus, again one of the essential pre-requisites of a valid trust (ie, certainty of words, of subject, of object) is missing. In this trust deed, the Foundation, characterised as a 'charitable foundation' does not in its purposes, appear to target any single person. Conversely it purports "to create and establish a non profit religious trust body to promote the act of charity amongst devotees of the Deity Thean Hou" It seemingly intended to be a charitable trust as its own name depicts, although here too, and for the same reasons already stated above, it would be invalidly created as such an entity.

[18] In its attempt to have itself incorporated, the Foundation made an application under s. 2 of Cap. 148 to the public trustee ie, Amanah Raya Berhad (Cawangan Sabah), who in turn referred the application to the State Attorney General (SAG) for advice. The SAG proffered the following advice which we now quote from its letter dated 30 October 2008. It says:

- A 2. Jabatan kami berpendapat bahawa permohonan berkenaan tidak teratur atas sebab-sebab berikut:
- (a) It should be noted that the Trustees (Incorporation) Ordinance is to incorporate the trustees appointed by any established body or association of persons as a corporate body and the said Ordinance is not for the purpose of incorporating that body or association of persons as a corporate body. It seems the trust deed is used to create "The Kudat Thean Hou Charitable Foundation" and registered it as "The Registered Trustees of the Kudat Thean Hou Charitable Foundation" under the said Ordinance. This is against the intention of the said Ordinance.
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This resulted in the application for its incorporation being rejected (see letter of Amanah Raya dated 26 February 2009).

- D [19] There is thus clear evidence that the trustees were never incorporated as required under s. 2 of Cap. 148.
- [20] In this appeal, the facts which no longer are hypothetical are not in dispute. The situation as shown in the quote from *Richard v. Naum (supra)* is thus not applicable to this case. What we need to determine is whether this is a fit and proper case for invoking O. 33 r. 2 RHC for a speedy and expeditious disposal of this matter. As we see it, what is left for our determination now is purely a well defined question of law *viz* the *locus standi* of the respondent to pursue this action. We need to reiterate that, the respondent here is suing by his name as Chairman of the Kudat Thean Hou Charitable Foundation. The said Foundation, as we found it, is neither a registered society nor an incorporated private trust as is now alleged. The trustees too were never incorporated as required under Cap. 148. We therefore hold that it has no *locus standi* to maintain its action and to allow it to stand would be an abuse of the court's process. We disagree with the learned judicial commissioner that the matter needs to go for full trial to further establish the facts. The facts are clearly there. What is left is for a finding on the law so that advantage can be taken of the rules that provide for decisive litigation in a manner that would save time and money. This aptly is such a case.
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- I [21] For these reasons, the appeals were allowed with costs. Both suits K22-19-2008 and K25-31-2007 are struck out with costs.